



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 202, 204, 212, 232, and 252**

**[Docket DARS-2019-0019]**

**RIN 0750-AK37**

**Defense Federal Acquisition Regulation Supplement: Performance-Based Payments (DFARS Case 2019-D002)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that amends 10 U.S.C. 2307 to address the use of performance-based payments.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, DPC/DARS, at 571-372-6106.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the *Federal Register* at 84 FR 18221 on April 30, 2019, to implement section 831 of the

National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, which amends 10 U.S.C. 2307 to address the use of performance-based payments (PBPs).

Eleven respondents submitted public comments in response to the proposed rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. There was widespread support for the proposed implementation of 10 U.S.C. 2307(b)(2) requirement that PBPs shall not be conditioned upon costs incurred in contract performance, but on achievement of performance outcomes (232.1001(a)). A number of changes are made in the final rule, which are expected to increase support for the rule, such as permitting alternate forms of security for performance-based payments and clarifying that an acceptable accounting system is not required for incurred costs under the performance-based payments clause. A discussion of the comments and the changes made to the rule as a result of the comments received is provided, as follows:

### *A. Summary of Significant Changes from the Proposed Rule*

1. The requirement for compliance with Generally Accepted Accounting Principles (GAAP) in order to receive performance-based payments at DFARS 232.1003-70 and in the representation at 252.232-7015 has been modified to apply to the contractor's

financial statements, rather than the "output" of the contractor's accounting system, and the requirement that compliance with GAAP must be evidenced by audited financial statements has been removed.

2. The procedures at DFARS 232.1004 are modified to eliminate the requirement to first agree on price using customary progress payments and then require consideration if performance-based payments are subsequently negotiated. In addition, contracting officers are encouraged to use both the progress payments and performance based payments clauses and provisions, when considering both types of financing methods.

3. The DFARS clauses 252.232-7012, Performance-Based Payments-Whole-Contract Basis, and 252.232-7013, Performance-Based Payments-Deliverable Items, are modified to specifically state that it is not necessary to have a Government-unique cost accounting system in order to report incurred costs under the clause.

4. A new paragraph (d) is added in DFARS 252.232-7012 and 252.232-7013 that provides some flexibility with regard to acceptable security, although title to the property described in paragraph (f) of the clause at FAR 52.232-32, Performance-Based Payments, is still the preferred security for receipt of performance-based payments.

5. A new provision is added at DFARS 252.232-7016, Notice of Progress Payments or Performance-Based Payments, to be used in lieu of FAR 52.232-13, Notice of Progress Payments, when the solicitation contains clauses for progress payments and performance-based payments, to explain that only one type of financing will be included in the resultant contract, except as may be authorized on separate orders subject to FAR 32.1003(c).

*B. Analysis of Public Comments*

*1. General support for the rule.*

*a. Generally support the rule.*

*Comment:* Various respondents expressed general support for the rule, particularly the removal of the requirement to limit PBP financing to costs incurred. One respondent stated that the proposed rule is a significant improvement over the current DFARS, creating a more inviting marketplace for private sector entities and nontraditional defense contractors. Another respondent wholeheartedly supported amending the DFARS to implement section 831 of the NDAA for FY 2017.

*Response:* Noted.

*b. Generally oppose the rule.*

*Comment:* One respondent stated that this rule is worse than the previous rule (DFARS Case 2017-D019, published 8/24/2018, withdrawn 10/4/2018), and against the original genuine intent of simplification to motivate the performance of the supplier.

Another respondent recommended adopting the revisions to the DFARS proposed in DFARS Case 2017-D019 that implement section 831, while disregarding those changes that were outside the scope of section 831.

One respondent stated that when DoD issued the proposed rule under DFARS case 2017-D019, DoD explained that the proposed rule would "relieve the administrative burden on contractors" by deleting the current regulations relating to performance-based payments at DFARS subpart 232.10 and the associated clauses at DFARS 252.232-7012 and 252.232-7013. This respondent recommended that DoD should repeal in their entirety the current DFARS regulations related to PBPs and the associated clauses, and any associated Procedures, Guidance, and Information (PGI), because existing FAR regulations are sufficient.

*Response:* It is the intent of this rule to implement section 831 of the NDAA for FY 2017. The prior DFARS Case 2017-D019 presented a cohesive approach to contract financing, in order to increase DoD's business effectiveness and efficiency as well as to provide an opportunity for both small and other than small entities to qualify for increased customary progress payment rates and maximum performance-based payment rates, based on whether the offeror/contractor has met certain performance criteria. The provisions of that rule were interdependent upon each other, and DoD cannot segregate out specific aspects of

that rule in the absence of the criteria that were intended to motivate performance.

In response to the comment that DoD should repeal in their entirety the current DFARS regulations relating to performance-based payments, DoD does not consider this to be in the best interest of DoD or of contractors. DFARS coverage, as modified by this final rule, provides needed clarification and also provides flexibility with regard to security for performance-based payments. The following discussion will address more specific concerns about the proposed rule.

*2. Make PBPs the preferred method of contract finance.*

Many respondents stated that DoD should clearly establish PBPs as the default choice for contract financing.

*a. Benefits of performance-based payments.*

*Comment:* Several respondents particularly emphasized the benefits of PBPs. These respondents stated that PBPs better align the interests of the Government and the contractors. According to these respondents, by effectively attributing the payments to the work performance, rather than just costs incurred, the Government receives tangible product deliverables and the contractor receives cash payment tied to performance, which encourages the timely execution of the contract. One respondent stated that PBPs may reduce costs for Government oversight and compliance, encourage nontraditional and small

business entities to enter the Federal marketplace, and facilitate contractor financing and performance of contracts.

*Response:* DoD agrees that appropriate use of PBPs has benefits. This rule is consistent with the statutory preference for PBP; however, the Government reserves the right to determine the best option for contract financing based on the individual contract action. Due to the evaluation criteria required to determine whether PBP is the best method of contract financing, DoD will not direct that PBP is the default choice for contracts.

*b. Eliminate the requirement for two-step negotiation and consideration.*

*Comment:* Although not addressed in the proposed rule, many respondents were concerned that the existing procedures at DFARS 232.1004 pose hindrances to the preference for PBPs. Specifically, many respondents were concerned about retention of the procedures at DFARS 232.1004, which require initial agreement on price using customary progress payments before negotiations begin on the usage of performance-based payments. One respondent stated that the two-step negotiation process is unjustifiably unique to DoD.

Furthermore, the DFARS currently requires negotiation of consideration to be received by the Government if the performance-based payments payment schedule will be more

favorable to the contractor than customary progress payments. Two respondents stated that this process is counter to the system outlined in FAR 32.005(a). One of these respondents stated that performance-based payments are a program management tool, whereas progress payments simply reimburse contractors for costs incurred. Therefore, according to the respondent, comparing the payments schedule of one to the other is not an "apples-to-apples" comparison. Performance goals required by PBPs serve as additional requirements placed on the contractor that offset the payment schedule difference offered by PBPs compared to progress payments. Requiring additional consideration erodes the potential benefits of PBPs relative to the increased risk accepted by contractors, and undermines the policy objective to incentivize performance. Several respondents stated that DoD added this policy specifically to reverse the preference for PBPs.

*Response:* DoD has removed this requirement in the final rule (see DFARS 232.1004).

*c. Eliminate or completely overhaul the PBP analysis tool.*

*Comment:* Several respondents specifically recommended eliminating or completely overhauling the PBP analysis tool, which DoD developed to allow the contracting officer and industry to compare the financial cost and benefits of using PBPs versus customary progress payments. While one respondent



acknowledged that slight changes have been made to improve the tool, the respondent still finds the "conceptual shortcomings" of DoD's policy unchanged. One respondent offered the following detailed criticisms of the PBP Tool:

- The tool assumes if there are costs in the first month of the program there will be a Progress Based Payment in the first month of the program. Invoices for PBP's are submitted after the end of the month and thus cannot be paid before about the middle of the 2nd month of the program. This flaw skews the results by assuming the contractor receives payment nearly a month before it is possible. The tool does not provide a mechanism for adjusting calculations based on specific contract requirements when such requirements impact payment lag time either positively or negatively.
- The PBP tool is intentionally structured to keep a contractor cash flow negative regardless of how well the contractor performs.

*Response:* The DoD tool takes into account a 22-day lag time between when expenditures occur and when progress payments are made. This accounts for the fact that all expenditures do not occur on the first day of a month or the last day. This is an industry average, and does not accommodate unique lag times by contract.

Contractors are supposed to have a positive investment in the effort. FAR 32.1004(b)(3)(ii) states that the contracting officer must ensure that PBPs are not expected to result in an unreasonably low or negative level of contractor investment in the contract.

Therefore, contracting officers are still required to use the PBP analysis tool to objectively measure both the benefits and risks of the PBP financing arrangement, and negotiate a mutually beneficial settlement position that reflects adequate consideration to the Government for the improved contractor cash flow. However, the PBP Tool has been revised to remove the cost limitation in accordance with this final rule.

### *3. Compliance with Generally Accepted Accounting Principles.*

#### *a. Audited financial statement.*

*Comment:* One respondent found the requirement to evidence compliance with Generally Accepted Accounting Principles (GAAP) through audited financial statements burdensome to the contractor.

*Response:* The requirement that the contractors compliance with GAAP must be evidenced through audited financial statements has been removed from the final rule.

#### *b. Make language of rule mirror the statute.*

*Comment:* One respondent was concerned that the proposed DFARS rule does not exactly mirror the statute when it requires that

"the output of a contractor's accounting system" shall be in compliance with GAAP, whereas the statute requires "a contractor's accounting system" to be in compliance (or noncompliance) with GAAP.

*Response:* The wording of the statute is imprecise, because an accounting system cannot be in compliance with GAAP. Compliance with GAAP means that the financial statements are fairly presented, i.e., that the information contained within the financial statements complies with GAAP in all material respects. Therefore, in order to improve the clarity of the final rule, the requirement for compliance with GAAP in order to receive PBPs is now applied to "the contractor's financial statements" rather than "the output of the contractor's accounting system" (see 232.1003-70 and 252.232-7015).

*c. Representation is unnecessary.*

*Comment:* One respondent stated that the proposed representation at DFARS 252.232-7015 with regard to compliance with GAAP is unnecessary, since costs incurred have no bearing on the amounts billed under PBPs.

*Response:* The fact that incurred costs no longer have bearing on the amounts billed under PBPs has no relevance to the requirement for representation by the offeror that its financial statements are, or are not, in compliance with GAAP. Section 831, as codified at 10 U.S.C. 2307(b)(4), requires compliance

with GAAP in order to receive performance-based payments.

Providing a representation is one of the least burdensome ways to demonstrate compliance with GAAP.

#### *4. Reporting of incurred costs.*

Most respondents had objections to the continued requirement for reporting of incurred costs in the clauses at DFARS 252.232-7012 and 252.232-7013.

##### *a. Requirement for Government-unique accounting system.*

*Comment:* One respondent noted that 10 U.S.C. 2307 expressly states that the Secretary of Defense shall ensure that nontraditional defense contractors and other private sector companies are eligible for performance-based payments and that there shall be no requirements for a contractor to develop Government-unique accounting systems or practice as a prerequisite for agreeing to receive PBPs. Some respondents believed that retention of the requirement to report cumulative contract costs incurred to date, as a condition of receiving PBPs, imposes a requirement to develop a Government-unique accounting system, and therefore is inconsistent with 10 U.S.C. 2307(b)(4)(A), as amended by section 831. For example, one respondent stated that the cost reporting in the proposed rule would require a Government-unique job order cost accounting system to generate FAR- and DFARS-compliant cost reports.

*Response:* The reporting of incurred costs does not require a Government-unique cost accounting system. Systems that identify costs with the projects for which they are incurred ("job costing," as a broad term) are not at all unique to Government requirements. It would be highly unlikely for a fiscally sound company to have no means of identifying the costs of performing a contract. Furthermore, the rule does not require any particular accounting system; rather, the rule states that "incurred cost is determined by the Contractor's accounting books and records."

*Comment:* One respondent while expressing concern that the reporting requirement could be interpreted to require the submission of FAR part 31 compliant costs, stated that costs generated by a GAAP-compliant system should be sufficient to provide DoD with data necessary for negotiation of PBPs in future contracts. This respondent recommended clarification that a contractor may report costs from its GAAP-compliant system, adjusted by a decrement factor to reflect estimated unallowable costs as appropriate.

*Response:* The clauses in the final rule have been revised to specify that if the Contractor's accounting system is not capable of tracking costs on a job order basis, the Contractor shall provide a realistic approximation of the allocation of incurred

costs attributable to this contract in accordance with the Contractor's accounting system.

DoD considers that it would constitute excessive risk to the Government and would be an impediment to issuing financing payments to a company if that company is unable to comply with this requirement, even when it is properly understood that this clause does not require a "Government-unique" accounting system. To the extent that a company is unable to report the costs of performance at all, relying on its own accounting books and records, this will make it impossible for the Government to have any confidence that complete performance of the contract is assured, or that the negotiated events "reflect prudent contract financing" (FAR 32.1004(b)(2)(i)) and do not "result in an unreasonably low or negative level of contractor investment in the contract" (FAR 32.1004(b)(3)(ii)).

*b. Disincentive to use of PBPs, rather than a preference.*

*Comment:* One respondent stated that nontraditional entities may be disinterested in expending time and resources to implement business systems to collect and report costs on a contract basis, which are beyond the system necessary to comply with GAAP. Similarly, another respondent stated that the requirement to report incurred costs undermines the stated preference for PBPs, could deter contractors from pursuing PBPs because contractors with only fixed-price contracts are unlikely

to track costs on a contract-by-contract basis, and effectively would require many contractors to add business and compliance systems if they were to pursue PBPs. They suggest that this is therefore contrary to the statutory preference at 10 U.S.C. 2307 for PBPs as a means of financing.

*Response:* If the contractor's financial statements are in compliance with GAAP, it is likely that the contractor, even a nontraditional defense contractor, will have some means of providing a realistic approximation of the allocation of incurred costs. While it is possible that some contractors will have no such system at all, rather than only no "Government-unique" system, DoD does not believe it is reasonable, necessary, or the intent of Congress, to issue Government financing when the recipient has no such visibility over its costs.

*c. Unnecessary and irrelevant.*

*Comment:* Most respondents contended that the requirement to report incurred costs was unnecessary. For example, one respondent stated that the Government should recognize the limits of the cost data collected when using it to inform negotiations on future contracts utilizing PBPs. This respondent contended that collecting costs incurred at each milestone payment represents an incomplete picture of total costs incurred by a contractor to complete a project. According

to the respondent, at least 10 percent of the contract costs are incurred between the last PBP milestone payment and the end of the program. Additionally, there are other factors such as rate adjustments which later affect the total costs incurred.

Another respondent stated that there is no need to use a comparison of a prior contract's PBP values and incurred costs in the negotiation of future contracts' PBP values.

Many respondents stated that what happened on the prior contract is simply not relevant to negotiation of the current contract's PBP event values. One respondent noted that a requirement to use information on incurred costs is not found in the DoD User's Guide to performance-Based Payments, nor is it found in the current (or proposed) DFARS language, nor is it found in the current PGI associated with PBPs. Several respondents also pointed out that because these are firm-fixed-price contracts, neither the contractor nor the Government have a need to track contract costs or report them in the manner required by the proposed rule.

*Response:* It would not be appropriate to collect this information on incurred costs as a means to condition payment of the current PBP events on incurred costs. The events are negotiated in advance of performance, and will not be changed merely on the basis of incurred costs. However, aside from the value to Government negotiators of being able to evaluate



current proposals for PBP milestone values against past experience, it remains important for the Government to know the risk it is incurring when it makes payments that may be disproportionate to the contractor's investment in contract performance. That is why the amounts assigned to PBP events must be "commensurate with the value of the performance event or performance criterion" (FAR 32.1004(b)(3)(ii)). DoD does not believe that Congress was unconcerned with ensuring some degree of accountability; if it had been, there would have been no purpose to the statutory requirement that "in order to receive performance-based payments, a contractor's accounting system shall be in compliance with Generally Accepted Accounting Principles."

*d. Use of incurred cost data in negotiations.*

*Comment:* One respondent was concerned that use of prior incurred costs in negotiation will create "never-ending discussions, allowing an excuse to prime contractors and contracting officer to delay payments and requiring in any case the burden on data collecting, validating, etc. on both the Supplier and the Buyer." This respondent also raised the issue of how data on incurred costs will be stored and managed and who will have access to the database created with these costs. The respondent questioned how the contracting officer will be able to find applicable previous cases.

*Response:* In accordance with FAR 15.403-3(b), the contracting officer may require data other than certified cost or pricing data to support a determination of a fair and reasonable price. In negotiations, one way to ensure a fair and reasonable price is through the use of various price analysis techniques and procedures to include a comparison of proposed prices to historical prices (i.e. incurred costs) paid for the same or similar items. Use of prior incurred costs in negotiations are not meant to create "never-ending" discussions, but to facilitate negotiation of a fair and reasonable price for all concerned parties. The requirement to provide incurred cost data is not a new requirement, and this data has been available for use in negotiations for many years. As with any sensitive information, all incurred cost data will be maintained in the official contract file for official use only. There is no intent to create a new database.

*5. Requirement for title.*

*Comment:* Two respondents addressed the requirement in FAR 52.232-32(f) that the Government take title to work in progress immediately upon the date of the receipt of a PBP payment.

Two respondents stated that the requirement for title conflicts with 10 U.S.C. 2307(b)(4)(A), which states that in order to receive performance-based payments, a contractor's accounting system shall be in compliance with GAAP, and there

shall be no requirement for a contractor to develop Government-unique accounting systems or practices as a prerequisite for agreeing to receive performance-based payments. According to the respondents, because many GAAP-compliant accounting systems are unable to isolate the work in process associated with a particular unit from the rest of the supply chain until delivery, requiring a contractor to deliver title to such goods is therefore de facto requirement for a Government-unique accounting system.

One respondent also stated that requiring title to work in process immediately upon receipt of a PBP payment represents bad policy. According to the respondent, allowing contractors to aggregate component purchases across multiple contracts can reduce costs and improve schedules. To maximize this flexibility, contractors need to be able to reallocate common parts between contracts based on customer needs and vendor availability. This benefits DoD.

Two respondents pointed out that DoD has existing flexibility in 10 U.S.C. 2307(d) to accept alternate forms of security for PBPs instead of taking title. According to these respondents, such alternate forms of security are common in the commercial marketplace, and allowing contractors without Government-unique accounting systems to provide an alternate form of security is

the only way to implement the mandate from Congress to open PBP access to all contractors with GAAP-compliant systems.

*Response:* While title to the property described in paragraph (f) of the clause at FAR 52.232-32, Performance-Based Payments, is the preferred security for receipt of progress payments, the final rule (DFARS 252.232-7012 and 252.232-7013) addresses the concerns and comments expressed concerning title by allowing the use of other forms of security if the contractor's accounting system is not capable of identifying and tracking through the build cycle the property that is allocable and properly chargeable to the contract.

*6. Definition of "nontraditional defense contractor."*

*Comment:* Two respondents stated that the DFARS does not define "nontraditional defense contractor" and recommended inclusion in the DFARS of the definition at 10 U.S.C. 2302(9).

*Response:* The definition of "nontraditional defense contractor" at 10 U.S.C. 2302(9) is incorporated in the DFARS at 212.001. However, since the term is now used in part 232, this final rule moves the definition from DFARS 212.001 to DFARS 202.101, so that the definition is applicable throughout the DFARS.

*7. Ceiling of 90 percent.*

*Comment:* One respondent recommended revision to the proposed rule to provide clarity on the financial ceiling of 90 percent

provided for in the FAR. According to the respondent, the DFARS should clearly state that performance-based payments will be based on a percentage of price, and that the ceiling for the basis will be 90 percent (FAR 32.1004(b)(2)(ii)).

*Response:* The DFARS does not restate the 90 percent ceiling that is already stated in FAR 32.1004(b)(2)(ii) and doing so is unnecessary because the DFARS supplements the FAR. Further, performance-based payments are not based on a percentage of price. The bases for performance-based payments are clearly defined in FAR 32.1002.

*8. Selection and valuation of milestone events.*

*Comment:* One respondent recommended that the final rule should clarify in the DFARS that a PBP payment associated with a particular milestone should reflect the value of all work accomplished by the contractor at the time it meets the milestone. This is consistent with current guidance in the PBP Guide, but the respondent has still encountered widespread confusion. According to the respondent, clarifying this interpretation can reduce the administrative burden by allowing flexibility to choose fewer and more meaningful milestones.

*Response:* DoD has considered this comment and concludes that no further clarification is required in the final rule. The DoD Performance Based Payment Guide contains sufficient direction with regard to identifying PBP events, establishing completion

criteria for PBP events, and establishing PBP event values. PBP events are established as representative milestones that may reflect the total effort needed to accomplish not only that particular milestone, but other activities through that timeframe; milestone events or criteria may be either severable or cumulative, and the contract should state which applies (FAR 32.1004(a)(2)). However, care must be taken to ensure that there is reasonable consistency in event valuation and that valuation of events is reflective of their relative value to the successful performance of the contract, so that the contractor's financial focus is in basic alignment with programmatic priorities.

*9. Training and guidance.*

Several respondents recommended additional training and guidance on PBPs to both program managers and contracting officers.

*a. PBP process.*

*Comment:* One respondent recommended training on the PBP milestone process because the respondent has encountered reluctance on the part of the Government due to lack of experience in use of PBPs and concern for administrative burden on the Government. Another respondent noted that establishing proper milestones requires an understanding of what it takes to perform the contract and how much it will cost. However, it also

requires understanding of how businesses operate and why they need certain funding when they do. Therefore, the respondent recommended guidance and training to procurement personnel on how to reach the proper balance between DoD and contractor needs.

*Response:* Each DFARS case is reviewed for training requirements/changes to current Defense Acquisition University training. In addition to the Continuing Learning Course (CLC 026), Performance Based Payment Overview, the Performance Based Payment Guide, and Guide for Performance Based Service Acquisitions, courses in the Contracting and Program Management curriculum contain appropriate information on PBPs to align with course goals. The changes in the DFARS will prompt changes in the guides and course to ensure the workforce understands the processes.

*b. Cash flow.*

*Comment:* One respondent recommended guidance to contracting officers that a slightly positive cash flow is acceptable and encouraged, since it further incentivizes performance. Another respondent when addressing training also noted that limiting reasonable cash flow to contractors may result in deferring expenditures, which could result in late delivery.

*Response:* FAR 32.1004(b)(2)(i) states that performance-based payments shall reflect prudent contract financing provided only

to the extent needed for contract performance, and FAR 32.1004(b)(3)(ii) states that the contracting officer shall ensure that performance-based payment amounts are commensurate with the value of the performance event or performance criterion and are not expected to result in an unreasonably low or negative level of contractor investment in the contract. DoD is not trying to limit reasonable cash flow with this rule as it does not differ from FAR 32.1004 (b)(2)(ii) which limits contract financing to 90% of price. Any training provided will be done so in accordance with the rules in the FAR and DFARS.

*10. Applicability to acquisition of commercial items.*

*Comment:* One respondent recommended that DoD should consider making PBPs available to commercial item contracts that are large in terms of scope and dollar value when the contractor needs early funding of the facilities, equipment, supplies and the like for performance. The respondent requested that DoD should provide guidance for such use of PBPs.

*Response:* The law contemplates the use of financing similar to performance based payments on commercial item as well as other contracts. However, it also requires that payments for commercial items "be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States" (10 U.S.C. §2307(f)(1)). It is impossible to



specify in the DFARS what specific terms and conditions for PBPs "are appropriate or customary in the commercial marketplace," since we assume they may vary widely depending on the marketplace for the kind of supply or service item being purchased. For this reason, the FAR and DFARS do not provide further detailed guidance other than what is already prescribed in FAR 32.2 and DFARS 232.2, "Commercial Item Purchase Financing."

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule amends the clauses at DFARS 252.232-7012 and 252.232-7013 and adds a new provision at DFARS 252.232-7015, Performance-Based Payments-Representation. These clauses and provision do not apply to contracts at or below the simplified acquisition threshold or for the acquisition of commercial items. In accordance with 10 U.S.C. 2307(f) and 41 U.S.C. 4505, FAR 32.201 provides that payment for commercial items may be made under such terms and conditions as the agency head determines are appropriate or customary in the commercial marketplace and are in the best interest of the United States. Furthermore, FAR 32.202-1 states that Government financing of commercial purchases is expected to be different from that used for noncommercial purchases. While the contracting officer may

adapt techniques and procedures from the noncommercial subparts for use in implementing commercial contract financing arrangements, the contracting officer must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.

#### **IV. Expected Cost Impact**

This rule amends the DFARS to implement changes to performance-based payment policies for DoD contracts by amending the policy on performance-based payments at DFARS 232.1001 and amending the clauses at DFARS 252.232-7012, Performance-Based Payments—Whole Contract Basis, and 252.232-7013, Performance-Based Payments—Deliverable Item Basis.

This rule may benefit contractors who receive contract financing from the Government in the form of performance-based payments. Performance-based payments do not apply to—

- Payments under cost-reimbursement line-items;
- Contracts awarded under the authority of FAR part 12 or part 13;
- Contracts for architect-engineer services or construction, or for shipbuilding or ship repair, when the contract provides for progress payments based upon a percentage or stage of completion.

Performance-based payments are tied to the achievement of specific, measurable events or accomplishments that are defined and valued in advance by the parties to the contract. Total performance-based payments cannot exceed 90 percent of the contract price.

This rule removes the DFARS restrictions that limit performance-based payments to amounts not greater than costs incurred up to the time of payment.

If performance-based payments to the contractor based on the negotiated value of completed milestone events are allowed to exceed the total costs incurred up to the time of payment, the cost to the contractor of short-term borrowing will decrease and the cost to the Government of borrowing will increase.

In addition, there is a minimal cost to offerors and the Government related to a new provision at DFARS 252.232-7015, Performance-Based Payments-Representation, which requires each offeror responding to a solicitation that may result in a contract providing performance-based financing to represent whether the offeror's financial statements are in compliance with Generally Accepted Accounting Principles.

This final rule includes additional amendments in response to industry feedback on the proposed rule, which are described in section II.A. of this preamble. In particular, one of the amendments provides alternative forms of security, in lieu of

the requirements of paragraph (f) of the clause at FAR 52.232-32. The amendment to the rule will facilitate the use of performance-based payments by contractors that may not have accounting systems designed for FAR part 15 cost-reimbursement work, and contractors without job-cost accounting systems that can associate work in progress with a specific contract. One company expressed support for this specific amendment at an E.O. 12866 meeting on the final rule.

DoD has performed a regulatory cost analysis on this rule. The following is a summary of the estimated public cost savings and Government costs in millions calculated in perpetuity in 2016 dollars at a 7-percent discount rate:

<b>SUMMARY</b>	<b>Public</b>	<b>Government</b>	<b>Total</b>
Present Value	-\$53.971	\$27.338	-\$26.633
Annualized Costs	-\$3.778	\$1.914	-\$1.864
Annualized Value Costs (as of 2016 if Year 1 is 2020)	-\$2.882	\$1.460	-\$1.422

To access the complete Regulatory Cost Analysis, go to the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov), search for "DFARS Case 2019-D002," click "Open Docket," and view "Supporting Documents."

## **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## **VI. Executive Order 13771**

This rule is an E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, deregulatory action. We estimate that this rule generates \$1.4 million in annualized cost savings, discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated cost savings can be found in section IV. of this preamble.

## **VII. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule implements section 831 the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, which amends 10 U.S.C. 2307 to address the use of performance-based payments. The primary objective of this rule is to remove the restrictions at DFARS 232.1001(a) and the clauses at 252.232-7012(b) (i) and 252.232-7013(b) (i) that limit performance-based payments to amounts not greater than costs incurred up to the time of payment, as required 10 U.S.C. 2307.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

This rule will apply to approximately 55 small entities per year that are awarded contracts that provide performance-based contract payments from DoD.

This rule adds a reporting requirement that will require an entry in the annual representations and certifications with regard to whether the offeror's financial statements are in compliance with Generally Accepted Accounting Principles. DoD estimates that the skill necessary for this requirement is at the journeyman level and that each entry will require an average of 6 minutes.

This rule will not have a significant economic impact on small entities. There are no significant alternatives consistent with the stated objectives of the statute.

#### **VIII. Paperwork Reduction Act**

This rule affects the information collection requirements at DFARS subpart 232.10 (and associated clauses at DFARS 252.232-7012 and 252.232-7013, currently approved under OMB Control Number 0704-0359, DFARS Part 232, Contract Financing. The impact, however, is negligible, because only the last three lines of the table are deleted, which do not impose the predominance of the burden. This rule also adds a new information collection requirement that has been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0750-0001, entitled "*Defense Federal Acquisition Regulation Supplement (DFARS), Performance-Based Payments-Representation.*"

**List of Subjects in 48 CFR Parts 202, 204, 212, 232, and 252**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 202, 204, 212, 232, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 202, 204, 212, 232, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 202-DEFINITIONS OF WORDS AND TERMS**

2. Amend section 202.101 by adding in alphabetical order a definition for "Nontraditional defense contractor" to read as follows:

**202.101 Definitions.**

\* \* \* \* \*

*Nontraditional defense contractor* means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

\* \* \* \* \*

**PART 204—ADMINISTRATIVE AND INFORMATION MATTERS**

3. Amend section 204.1202 by—

- a. Revising the section heading;
- b. Redesignating paragraph (2)(xv) as (2)(xvi); and
- c. Adding a new paragraph (2)(xv).

The revision and addition read as follows:

**204.1202 Solicitation provision and contract clause.**

\* \* \* \* \*

(2) \* \* \*

(xv) 252.232-7015, Performance-Based Payments—Representation.

\* \* \* \* \*



## **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

### **212.001 [Amended]**

4. Amend section 212.001 by removing the definition of “Nontraditional defense contractor”.

## **PART 232—CONTRACT FINANCING**

5. In section 232.1001, revise paragraph (a) to read as follows:

### **232.1001 Policy.**

(a) As with all contract financing, the purpose of performance-based payments is to assist the contractor in the payment of costs incurred during the performance of the contract. See PGI 232.1001(a) for additional information on use of performance-based payments. However, in accordance with 10 U.S.C. 2307(b)(2), performance-based payments shall not be conditioned upon costs incurred in contract performance, but on the achievement of performance outcomes. Subject to the criteria in 232.1003-70, all companies, including nontraditional defense contractors, are eligible for performance-based payments, consistent with best commercial practices.

\* \* \* \* \*

6. Revise section 232.1003-70 to read as follows:

### **232.1003-70 Criteria for use.**

In accordance with 10 U.S.C. 2307(b)(4)(A), a contractor’s financial statements shall be in compliance with Generally Accepted

Accounting Principles in order to receive performance-based payments. 10 U.S.C. 2307(b)(4)(B) specifies that it does not grant the Defense Contract Audit Agency the authority to audit compliance with Generally Accepted Accounting Principles.

7. In section 232.1004, revise paragraph (b) to read as follows:

**232.1004 Procedures.**

(b) *Establishing performance-based finance payment amounts.* (i) The contracting officer should include in a solicitation both the progress payments and performance-based payments provisions and clauses prescribed in this part, when considering both types of payment methods. Only one type of financing will be included in the resultant contract, except as may be authorized on separate orders subject to FAR 32.1003(c)).

(ii) The contracting officer shall analyze the performance-based payment schedule using the performance-based payments (PBP) analysis tool. The PBP analysis tool is on the DPC website in the Cost, Pricing & Finance section, Performance Based Payments - Guide Book & Analysis Tool tab, at

[http://www.acq.osd.mil/dpap/cpic/cp/Performance\\_based\\_payments.html](http://www.acq.osd.mil/dpap/cpic/cp/Performance_based_payments.html)

. (A) When considering performance-based payments, obtain from the offeror/contractor a proposed performance-based payments schedule that includes all performance-based payments events, completion criteria and event values along with the projected

monthly expenditure profile in order to negotiate the value of the performance events such that the performance-based payments are not expected to result in an unreasonably low or negative level of contractor investment in the contract. If performance-based payments are deemed practical, the Government will evaluate and negotiate the details of the performance-based payments schedule.

(B) For modifications to contracts that already use performance-based payments financing, the basis for negotiation must include performance-based payments. The PBP analysis tool will be used in the same manner to help determine the price for the modification.

(iii) The contracting officer shall document in the contract file that the performance-based payment schedule provides a mutually beneficial settlement position that reflects adequate consideration to the Government for the improved contractor cash flow.

\* \* \* \* \*

8. Amend section 232.1005-70 by-

- a. Revising the section heading;
- b. Redesignating the introductory text as paragraph (a);
- c. Redesignating paragraphs (a) and (b) as paragraphs (a)(1) and (2), respectively; and
- d. Adding new paragraph (b) and paragraph (c).

The revision and additions read as follows:

**232.1005-70 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(b) Use the provision at 252.232-7015, Performance-Based Payments-Representation, in solicitations where the resulting contract may include performance-based payments.

(c) Use the provision at 252.232-7016, Notice of Progress Payments or Performance-Based Payments, in lieu of FAR 52.232-13, Notice of Progress Payments, when the solicitation contains clauses for progress payments and performance-based payments (only one type of financing will be included in the resultant contract, except as may be authorized on separate orders subject to FAR 32.1003(c)).

**PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

9. Amend section 252.204-7007 by-

a. Removing the provision date of "(DEC 2019)" and adding "(APR 2020)" in its place; and

b. Adding paragraph (d)(2)(vii) to read as follows:

**252.204-7007 Alternate A, Annual Representations and Certifications.**

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(vii) 252.232-7015, Performance-Based Payments-Representation.

\* \* \* \* \*

10. Amend section 252.232-7012 by—

- a. In the introductory text, removing “232.1005-70(a)” and adding “232.1005-70(a)(1)” in its place;
- b. Removing the clause date of “(MAR 2014)” and adding “(APR 2020)” in its place;
- c. Redesignating paragraph (b) as (c);
- d. Adding a new paragraph (b);
- e. Revising the newly redesignated paragraph (c); and
- f. Adding paragraph (d).

The additions and revision read as follows:

**252.232-7012 Performance-Based Payments-Whole-Contract Basis.**

\* \* \* \* \*

(b) In accordance with 10 U.S.C. 2307(b)(4)(A), the Contractor’s financial statements shall be in compliance with Generally Accepted Accounting Principles in order to receive performance-based payments.

(c)(1) The Contractor shall, in addition to providing the information required by FAR 52.232-32, submit information for all payment requests using the following format:

Current performance-based payment(s) event(s) addressed by this request:
--

Contractor shall identify—	Amount	Totals
(1a) Negotiated value of all previously completed performance-based payment(s) event(s);		
(1b) Negotiated value of the current performance-based payment(s) event(s);		
(1c) Cumulative negotiated value of performance-based payment(s) events completed to date (1a) + (1b); and		
(2) Total costs incurred to date.		

(2) Incurred cost is determined by the Contractor's accounting books and records, to which the Contractor shall provide access upon request of the Contracting Officer. An acceptable accounting system in accordance with DFARS 252.242-7006 is not required for reporting of incurred costs under this clause. If the Contractor's accounting system is not capable of tracking costs on a job order basis, the Contractor shall provide a realistic approximation of the allocation of incurred costs attributable to this contract in accordance with the Contractor's accounting system. FAR 52.232-32(m) does not require certification of incurred costs.

(d) *Security for financing.* (1) Title to the property described in paragraph (f) of the clause at FAR 52.232-32, Performance-Based Payments, is the preferred security for receipt of performance-based payments.

(2) (i) If the Contractor's accounting system is not capable of identifying and tracking through the build cycle the property that is allocable and properly chargeable to this contract, the Contracting Officer may consider acceptance of one or a combination of the following alternative forms of security sufficient to constitute adequate security for the performance-based payments and so specify in the contract, consistent with FAR 32.202-4:

(A) A paramount lien on assets.

(B) An irrevocable letter of credit from a federally insured financial institution.

(C) A bond from a surety, acceptable in accordance with FAR part 28.

(D) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership interest to the Contractor.

(E) Title to identified Contractor assets of adequate worth.

(ii) Paragraph (f) of the clause at FAR 52.232-32 does not apply to the extent that the Contractor and the Contracting

Officer agree on alternative forms of security. In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment will be made under this contract. Upon receipt of adequate security, financing payments will be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided and suspend further payments to the Contractor; and the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

11. Amend section 252.232-7013 by—

- a. In the clause introductory text, removing "232.1005-70(b)" and adding "232.1005-70(a)(2)" in its place;
- b. Removing the clause date of "(APR 2014)" and adding "(APR 2020)" in its place;
- c. Redesignating paragraph (b) as (c);
- d. Adding a new paragraph (b);
- e. Revising the newly redesignated paragraph (c); and



f. Adding paragraph (d).

The additions and revision read as follows:

**252.232-7013 Performance-Based Payments-Deliverable-Item Basis.**

\* \* \* \* \*

(b) In accordance with 10 U.S.C. 2307(b)(4)(A), the Contractor's financial statements shall be in compliance with Generally Accepted Accounting Principles in order to receive performance-based payments.

(c)(1) The Contractor shall, in addition to providing the information required by FAR 52.232-32, submit information for all payment requests using the following format:

Current performance-based payment(s) event(s) addressed by this request:		
Contractor shall identify-	Amount	Totals
(1a) Negotiated value of all previously completed performance-based payment(s) event(s);		
(1b) Negotiated value of the current performance-based payment(s) event(s);		
(1c) Cumulative negotiated value of performance-based payment(s) event(s)		

completed to date (1a) + (1b); and		
(2) Total costs incurred to date.		

(2) Incurred cost is determined by the Contractor's accounting books and records, to which the Contractor shall provide access upon request of the Contracting Officer. An acceptable accounting system in accordance with DFARS 252.242-7006 is not required for reporting of incurred costs under this clause. If the Contractor's accounting system is not capable of tracking costs on a job order basis, the Contractor shall provide a realistic approximation of the allocation of incurred costs attributable to this contract in accordance with the Contractor's accounting system. FAR 52.232-32(m) does not require certification of incurred costs.

(d) *Security for financing.* (1) Title to the property described in paragraph (f) of the clause at FAR 52.232-32, Performance-Based Payments, is the preferred security for receipt of performance-based payments.

(2)(i) If the Contractor's accounting system is not capable of identifying and tracking through the build cycle the property that is allocable and properly chargeable to this contract, the Contracting Officer may consider acceptance of one or a combination of the following alternative forms of security sufficient to constitute adequate security for the performance-

based payments and so specify in the contract, consistent with FAR 32.202-4:

(A) A paramount lien on assets.

(B) An irrevocable letter of credit from a federally insured financial institution.

(C) A bond from a surety, acceptable in accordance with FAR part 28.

(D) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership interest to the Contractor.

(E) Title to identified Contractor assets of adequate worth.

(ii) Paragraph (f) of the clause at FAR 52.232-32 does not apply to the extent that the Contractor and the Contracting Officer agree on alternative forms of security. In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment will be made under this contract. Upon receipt of adequate security, financing payments will be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the

event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided and suspend further payments to the Contractor; and the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

12. Add section 252.232-7015 to read as follows:

**252.232-7015 Performance-Based Payments--Representation**

As prescribed in 232.1005-70(b), use the following provision:

**PERFORMANCE-BASED PAYMENTS--REPRESENTATION (APR 2020)**

(a) In accordance with 10 U.S.C. 2307(b)(4)(A), the Contractor's financial statements shall be in compliance with Generally Accepted Accounting Principles in order to receive performance-based payments.

(b) The Offeror represents that its financial statements are [ ] are not [ ] in compliance with Generally Accepted Accounting Principles.

(End of provision)

13. Add section 252.232-7016 to read as follows:

**252.232-7016 Notice of Progress Payments or Performance-Based Payments**

As prescribed in 232.1005-70(c), insert the following provision:

**NOTICE OF PROGRESS PAYMENTS OR PERFORMANCE-BASED PAYMENTS (APR 2020)**

(a) The need for customary progress payments in accordance with subpart 32.5 of the Federal Acquisition Regulation (FAR) or performance-based payments in accordance with FAR subpart 32.10 will not be considered as a handicap or adverse factor in the award of the contract.

(b) This solicitation includes a FAR and Defense Federal Acquisition Regulation Supplement (DFARS) clause for performance-based payments and a FAR clause for progress payments. The resultant contract will include either performance-based payments or progress payments, not both, except as may be authorized on separate orders subject to FAR 32.1003(c).

(1) The performance-based payments clauses will be included in the contract if—

(i) The Offeror has provided positive representation in response to DFARS 252.232-7015, Performance-Based Payments—Representation;

(ii) The Offeror proposes a performance-based payment arrangement in accordance with FAR 52.232-28, Invitation to Propose Performance-Based Payments, including proposed events and timing, event completion criteria, event values, and expected expenditure profile; and

(iii) The Offeror and the Government reach agreement on all aspects of the arrangement.

(2) If performance-based payments clauses are not included in the resultant contract, the progress payments clause included in this solicitation will be included in any resultant contract, modified or altered if necessary in accordance with FAR 52.232-16 and its Alternate I. Even though the progress payments clause is included in the contract, the clause shall be inoperative during any time the contractor's accounting system and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs.

(End of provision)

[FR Doc. 2020-06728 Filed: 4/7/2020 8:45 am; Publication Date: 4/8/2020]